IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Bank of Italy National Trust and Savings Association, a national banking association,

Appellant,

vs.

The Farmers and Merchants National Bank of Merced, a national banking association, and Henry P. Hilliard, as Receiver thereof,

Appellees.

APPELLANT'S OPENING BRIEF.

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TOPICAL INDEX.

INDEX TO APPENDIX.

TABLE OF CASES CITED.

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INTRODUCTORY STATEMENT.

The essential facts involved in this litigation are clearly set forth in the opinion or memorandum of decision with the supplement thereto as prepared and filed by the trial judge. The opinion and supplement are shown at pages 21 and 29 of the record. For convenience we have, however, attached copies of both to this brief as an appendix.

The action was for damages for the conversion by the appellee, The Farmers and Merchants National Bank

of Merced, of personal property consisting of bonds and securities belonging at the time of the conversion to the Merced Security Savings Bank, the assignor of plaintiff. For convenience we will refer, in this brief, as was done in the opinion of the trial court, to the owner of these bonds and securities as the Savings Bank, and will refer to the alleged wrongdoer as the National Bank. These bonds and securities, with the interest thereon, were, at the time of the conversion, of the value of approximately $28,000.00.

At all times involved in the litigation and up to September 20, 1926, one J. B. Hart was city treasurer of the city of Merced, a municipal corporation. He was also president and active manager of the National Bank. He transacted all his business, both as city treasurer and as bank president and manager in the same office in the bank premises. Not long prior to December 31st, 1925, the Savings Bank, assignor of plaintiff and appellant, made application to Hart, as city treasurer, to obtain a deposit of $25,000.00 of city funds. This was done pursuant to the terms of a statute of the state of California (Statutes 1923, page 25). Under the provisions of this statute the Savings Bank, upon receiving the $25,000.00 deposit of city moneys, was required to deposit with Hart, as city treasurer, securities ten per cent in excess of the deposit. On December 31st, 1925, this transaction between the Savings Bank and Hart, as city treasurer, was consummated. The bank received $25,000.00 of city funds on general deposit and delivered to Hart securities consisting principally of municipal bonds of the value of $28,000.00.

All the facts recited were found by the trial court to be true and are set forth in the opinion or memorandum of decision written by the learned trial judge. From this portion of the findings no appeal has been taken by either party.

Likewise unquestioned on this appeal are the further findings of the trial court that between December 31st, 1925, the date of the deposit and placing of the securities of the Savings Bank with Hart, as city treasurer, and September 20th, 1926, Hart delivered the possession of said bonds and securities to the National Bank and that on May 13th, 1926, the National Bank sold and converted said bonds of the Savings Bank and appropriated the proceeds thereof to its own use, to the damage of the Savings Bank in the sum of $28,000.00.

The court further found that the sale and conversion of the bonds were not made in connection with the deposit of public funds in the Savings Bank and were not dependent upon or connected therewith in any way whatever.

Still further findings of the trial court are that the conversion of the bonds was unknown to the Savings Bank or to its successor, plaintiff herein, and was not discovered until subsequent to September 20th, 1926, at which time the National Bank went into liquidation and the defendant receiver was named by the comptroller.

It was the contention of the defendants that the National Bank did not convert the bonds in question. It was claimed that Hart, as agent of the National Bank, never received or converted the bonds, but that his wrongdoing was personal, or as city treasurer, and was not

imputable to the National Bank of which he was president and active manager. Concerning this contention the court [Record p. 24] found:

> "The correspondence of Hart as the National Bank president as well as the books and records of the National Bank and specifically the entries therein concerning the bonds alleged to have been converted, clearly show that Hart was the agent of defendant National Bank in dealing with the securities in suit and that the conversion of the bonds of the Savings Bank admittedly made by Hart is chargeable to the National Bank as his principal. These records represent that the National Bank was the owner of the securities. The city could not be held chargeable for Hart's keeping, management and disposal of the bonds under the applicable California statutes. (Sec. 8, Cal. Stat. 1923, p. 25.) It is contended that the National Bank should not be held accountable for the conversion and loss of the securities of the Savings Bank because the evidence fails to show that the National Bank profited by the irregularities and dishonesty of Hart in converting these securities. I cannot agree with this contention. The record is clear that the assets of the National Bank were preserved and enhanced by its president's transactions concerning these bonds with the First National Bank in Fresno. The transactions were apparently regular and within the apparent lawful and customary duties of an officer of a National Bank and inured to the benefit of the National Bank. See *Campbell v. Mfg. Nat. Bank,* 91 Am. State Rep. 438; *First Nat. Bank v. Town of Millford,* 36 Conn. 93; *Bennett v. Judson,* 21 N. Y. 238; *U. S. v. Pan Am. Pet. Co.,* 24 Fed. 2nd 209. It is also clear that the Savings Bank sustained detriment and money damage because of the conversion. It has lost its bonds. Its damage is the market value of them. Under such circumstances the responsibility of the National Bank and the right of *recovery* in the Savings Bank is clear.

> "The defendant has cited many cases, of which *School Dist. of City of Sedalia, Mo., v. DeWeese,* 100 Fed. 705, is typical. I do not regard these authorities as in point here. In all of them, it appeared and was so held that the agent of the bank was acting in his individual capacity or at least was not acting within the apparent scope of his authority as the bank's agent. In the case at bar, however, I have already adverted to the clarity of the evidence that showed the transactions of Hart with the bonds in question to have been those of the National Bank. These facts clearly distinguish the case cited by defendant."

As we understand it, none of the foregoing facts or conclusions are disputed on this appeal. The defendants in the action have not appealed from the decision of the trial court, and the appellant has no fault to find with the findings and conclusions of the trial judge covering the matters which we have so far recited. It will be unnecessary, therefore, even to refer to the evidence up to this point.

On September 28th, 1926, Hart, the city treasurer and president of the National Bank, committed suicide under sensational circumstances. It was immediately discovered that he had been guilty of a long series of defalcations and irregularities as city treasurer of the city of Merced, and in other capacities. One of these defalcations consisted of the conversion of the bonds and securities placed with him by the Savings Bank. As city treasurer Hart was bonded by the Fidelity and Deposit Company of Maryland.

After the death of Hart and the collapse of the National Bank, and at the time of the discovery of the conversion of the bonds belonging to the Savings Bank

by Hart and the National Bank, there was still on deposit with the Savings Bank the sum of $14,000.00, with interest, belonging to the city of Merced. This represented the balance of the original $25,000.00 deposit of city moneys remaining in the bank after various sums had been disbursed in payment of warrants drawn upon Hart, as city treasurer, against the fund. Upon discovery of the conversion of its bonds and securities the Savings Bank refused to pay to the city or on its account any part of this $14,000.00, but retained the whole of it. As the situation then stood the Savings bank had lost its bonds and securities of the value of $28,000.00 and against this loss it retained $14.000.00 of the deposit belonging to the city of Merced.

At this point numerous actions at law were commenced. One of these was a suit by the city of Merced against the Savings Bank to recover the balance of its deposit, amounting to $14,000.00, with interest.

Thereupon the Fidelity and Deposit Company of Maryland, surety on Hart's official bond as city treasurer, entered the picture. As a result of certain negotiations between the surety company, the Savings Bank and the city of Merced, the plaintiff and appellant, as successor of the Savings Bank, paid the city the balance of its deposit, amounting to $14,000.00 and interest. The surety on Hart's bond, Fidelity and Deposit Company of Maryland, thereupon paid the plaintiff and appellant, as successor of the Savings Bank, an amount equivalent to the sum paid the city, although it protested it was not liable for the conversion of the bonds by Hart and the National Bank.

The suit commenced by the city against the Savings Bank for this sum of $14,000.00 was thereupon dismissed, as were the various other actions commenced about the same time. In addition to this sum of $14,000.00 the Fidelity and Deposit Company of Maryland, surety on Hart's bond, paid the plaintiff and appellant, as successor of the Savings Bank, the sum of $5,500.00 in cash. As the situation then stood plaintiff and appellant, as successor of the Savings Bank, had lost its bonds and securities of the value of $28,000.00, but had received reimbursement therefor to the extent of $19,500.00, with interest it had paid on the deposit of the city moneys. This reimbursement was made, not by Hart or the National Bank, the joint tort feasors in the conversion of the bonds, but by the Fidelity and Deposit Company of Maryland, the surety on Hart's official bond as treasurer of the city of Merced.

Upon the making of these payments the surety company entered into an agreement with the plaintiff and appellant, as successor of the Savings Bank, that the latter should commence this action for the value of the bonds converted by the National Bank, and that if successful in recovering judgment it would pay one-half of the net proceeds of the suit to the surety, Fidelity and Deposit Company of Maryland. The agreement was effected between the plaintiff and appellant and the surety company through oral negotiations and correspondence. The substance of this agreement is embodied in a letter under date of August 12th, 1927, written by Guy LeRoy Stevick, as vice-president of Fidelity and Deposit Company of Maryland, and addressed to Louis Ferrari, as

vice-president of plaintiff and appellant. The body of the letter [Record p. 97] is as follows:

> "*In re J. B. Hart.*
>
> I beg to confirm the terms of settlement of claims against us under the above bond, to-wit:
>
> 1. We will pay to the City of Merced the sum of $11,000.
>
> 2. We agree to hold the City of Merced harmless from the claim of the Receiver based upon certain warrants aggregating $3,027.62.
>
> 3. *We will pay to you the amount of City's deposit and interest upon it at the rate agreed to be paid by your bank (This amount to be paid by you to the City).*
>
> 4. We will pay to you further the sum of $5,500. and will agree also to pay you one-half of any saving which we may make on the claim of the Receiver against the City. It is to be understood, however, that we reserve the right to pay that claim in full, or to make any adjustment we think best.
>
> 5. We understand you will at once bring suit against the Receiver of the Farmers & Merchants Bank for the value of the bonds misappropriated by that bank, and that in consideration of the payments made to you you will, if successful, pay to us one-half of the net proceeds of that suit after deducting all costs, expenses and attorneys fees. In case either you or we are reimbursed in full for any loss then the other party shall be entitled to the balance of the net proceeds until it is fully reimbursed.
>
> I am sending a copy of this letter to Mr. Henderson, and if he and you advise that this is satisfactory we will make payment forthwith."

The $11,000.00 mentioned in the first paragraph of the letter represents other defalcations of Hart as city treasurer and is not involved in this litigation. The

second paragraph refers to warrants outstanding against the funds of the city of Merced then on deposit with the plaintiff and appellant.

The court ultimately found that the value of the bonds and securities converted by the National Bank was $27,300.00, and that subsequently there was paid to the plaintiff and appellant by the Fidelity and Deposit Company of Maryland, the corporate surety upon the official bond of J. B. Hart, as city treasurer, the sum of $20,547.02, leaving unpaid the sum of $6,752.98. [Record pp. 56 and 57.] Judgment was entered against the appellees for this amount with interest and costs of suit. [Record pp. 58 and 59.]

The only question for determination upon this appeal concerns the soundness of the trial court's ruling that the various amounts paid to the plaintiff and appellant by the Fidelity and Deposit Company of Maryland, as surety on Hart's bond, aggregating $20,547.02, should be deducted from the total value of the bonds at the time of the conversion. The contention of the plaintiff and appellant is that no deduction should be made from the full value of the bonds, $27,300.00, by reason of payments made under the circumstances by the bonding company, and that the judgment for the plaintiff and appellant should be for the full sum of $27,300.00 instead of $6,752.98.

We believe that under the undisputed facts in the case and the law applicable thereto the learned trial judge, in this most important decision in the case, was in error, and that the judgment should be reversed or modified so as to accord with the evidence and the law applicable thereto. We are satisfied that this should be done for a number of reasons which we will set forth and discuss in order.

I

One Who Wrongfully Converts Property Owned by Another Is Liable for the Full Value Thereof, and Cannot Claim Credit for Reimbursements Made to the Owner by a Third Person Who Is Not Acting in Privity With Such Wrong-Doer.

It is an admitted and uncontroverted fact upon this appeal that the bonds and securities involved were the property of the Savings Bank, the predecessor in interest of the plaintiff and appellant, and that said bonds and securities, after being entrusted to Hart as city treasurer, were delivered by him to the appellee, the National Bank, and were afterwards sold and converted by said National Bank to its own use and benefit without the knowledge or consent of the Savings Bank, or the city of Merced. These facts were expressly found to be true by the trial court in its findings, as shown at page 54 of the record. It was further expressly found by the trial court [Record p. 56] that these bonds and securities at the time of the conversion, and at all times thereafter, were of the value of $27,300.00.

From the foregoing it would seem to follow, as surely as day follows night, that the plaintiff and appellant in this case, as the successor in interest of the Savings Bank, is entitled to recover from the defendant and appellee, the National Bank, the full sum of $27,300.00, the value of the bonds and securities. It is true that the plaintiff and appellant has received some reimbursement for the loss of its bonds and securities from the Fidelity and Deposit Company of Maryland, the surety upon Hart's bond as city treasurer. This reimburse-

ment, however, was received as the result of a private arrangement or settlement between the surety company and the appellant. It was an arrangement or understanding with which the defendant and appellee, the National Bank, was not in any way connected, and was not in any way concerned. It is not contended that the National Bank, the wrongdoer, or Hart, its joint tort feasor, ever contributed a single cent towards the reimbursement received by the plaintiff and appellant on account of the conversion of its bonds and securities.

The situation of the National Bank in this case is exactly analogous to the position of one who converts to his own use the property of another when he has no right, title or interest whatsoever in the property so converted. In this case the National Bank was an entire stranger to the title or ownership of the bonds and securities involved. It possessed no shadow of title to the bonds, and has never claimed and does not now claim ownership of any interest in the same. No right of possession of the bonds or securities, moreover, was ever held by the National Bank. At every stage of the proceeding its dealing with these bonds was wrongful and unlawful Its status in the whole transaction was not essentially different from that of a thief dealing with property, the possession of which had been wrongfully obtained from another.

Yet, according to the undisputed findings of the trial court, the National Bank, through its sale and conversion of these bonds and securities, obtained, and now retains, a profit amounting to $27,300.00. The trial court decrees that of this sum it should be required to

pay back only $6,752.98, and should be allowed to keep the remainder. The reason for this, as set forth in the opinion, is because the plaintiff and appellant has already received from other sources unconnected with the National Bank sums of money sufficient to make up the difference, and that it cannot claim double compensation for the injury occasioned by the conversion of its bonds and securities.

We cannot believe that the trial court was sound in the reasoning by which it arrived at the conclusion stated. We are convinced that the decision of the trial judge was the result of a lack of a thorough consideration of the facts involved and a lack of mature deliberation thereon. This resulted, no doubt, in the hasty and erroneous conclusion that the damages to be awarded to plaintiff and appellant should be the whole loss suffered by it, less the compensation it had received from *any* source, whereas, the true measure of its recovery should have been the whole loss suffered by it through the conversion, less any compensation made by the defendant and appellee, the National Bank, or by those acting in privity with it and making the payment of compensation for its benefit, or less any subordinate interest which the National Bank might have had in the converted property. As we have already stated, the National Bank had no title or interest whatsoever in the converted property subordinate to that of plaintiff and appellant, or otherwise. Further, it is not contended that the National Bank ever made any payment to plaintiff and appellant on account of its wrongful conversion of the property. It is not contended, moreover, that any payment was ever made directly by

Hart, the joint tort feasor of the appellee bank, to plaintiff and appellant by reason of the conversion.

The admitted fact is, as shown by the findings [Record p. 56], that no part of the value of the converted bonds and securities has been paid, except the sum of $20,547.02, which was paid by the Fidelity and Deposit Company of Maryland, the corporate surety upon the official bond of said Hart, as city treasurer.

It was one of the contentions of the defendants in the trial court that the payment of the sum of money mentioned by the surety on Hart's official bond as city treasurer constituted a payment by Hart, or by the estate of Hart, and that by reason of such payment by the surety company, and the subsequent agreement between it and the plaintiff and appellant, a complete settlement was had between Hart, or Hart's estate, and the appellant covering all claims arising from the conversion of the bonds and securities. It was further contended and argued by the defendants in the trial court that inasmuch as Hart was a joint tort feasor with the appellee National Bank, a settlement with and release of Hart, or Hart's estate, operated as a settlement with, and release of, Hart's joint tort feasor, the appellee National Bank.

The findings of the trial court, however, failed to sustain this contention of the defendants. The court held that neither the surety company on Hart's bond as city treasurer nor the city was a joint tort feasor with Hart, or the National Bank, in the conversion of the bonds and securities, and in support of its conclusion cited the case of *Gilbert v. Finch*, 173 N. Y. 455. [Record p. 28.] As to the contention of the defendants that the settlement

and agreement with the surety company constituted a settlement and agreement with Hart's estate and operated as a release and discharge of said estate and the National Bank from further liability, the trial court in its opinion [Record p. 27] said:

> "The record fails to substantiate the contention of defendants that plaintiff, as the Savings Bank's successor, has accepted full satisfaction from the administrator of Hart's estate and has released his estate from any further liability on account of the conversion by Hart of the bonds in controversy. On the contrary, it appears that the plaintiff has presented its claim against the estate of Hart for the value of its securities that Hart misappropriated and it further appears that no settlement or payment of any kind has been made or received on said claim. All that was done by plaintiff or its assignor was to dismiss the suit against the administrator of Hart's estate. The record shows no acknowledgment of satisfaction of the claim against Hart or his estate. It is true that where a suitor settles with one of two joint tort feasors and releases such one from further liability, his action is in effect a release of both joint tort feasors, but in my opinion, the proof in this complaint falls short of bringing the facts of this case within the aforesaid rule. The action of the successor of the Savings Bank in dismissing the case against Hart and the corporate surety on his official bond as city treasurer to recover the value of the securities converted amounted to nothing more than a covenant not to sue the Hart esetate or the Surety Company and cannot be said to have been the discharge of a joint tort feasor that would operate to release a National Bank from its liability because of its conversion through the agency of Hart of the bonds of the Savings Bank. The letters consummating the settlement agreed upon by the surety company, city of Merced and plaintiff contain a reservation by plaintiff as the Savings Bank's successor of its right to pursue the National Bank on Hart's default, and no acquit-

> tance is therein given to Hart's estate. The estate of Hart stands in the position of the joint tort feasor with the National Bank and it has never been released."

These findings and conclusions of the trial judge, subsequently carried into the findings of fact, approved by him and filed in the case, are unquestioned on this appeal. Without further argument, therefore, we may assume that the payments made by the surety company and its settlement and agreement with the plaintiff and appellant did not operate as a release of Hart, or Hart's estate, or the National Bank from any liability incurred by them by reason of their conversion of the bonds and securities of the plaintiff and appellant.

Yet the court held that these payments so made by the surety company should be deducted from the sum ultimately found to be due to the plaintiff and appellant by reason of the conversion. The portion of the trial court's decision from which this appeal is prosecuted is shown at page 28 of the record, where the court, among other things, says:

> "There can be but one compensation for an injury or tort of the kind that is involved in this suit, which is the market value of the securities converted at the time of conversion, with interest thereon until judgment. The plaintiff has received partial compensation of its loss. It is immaterial from whom any portion of such damage is paid, but any payment on account thereof reduces the liability *pro tanto.*"

This decision of the trial court is repeated in its supplemental decision in the case by certain language found at page 30 of the record, as follows:

> "Of course, if it is a fact that reimbursement was made and plaintiff actually received any sum of money in addition to the $5,500.00 in the settlement, then under the memorandum of decision, defendants would be entitled to credit for such additional amounts received by plaintiff herein, and the order for findings and judgment in favor of plaintiff and against defendants should be correspondingly modified."

We repeat that in our opinion the learned trial judge was in error in the language quoted. The liability of the defendants and appellees was not measured by what the plaintiff and appellant lost, less what it received in the way of compensation from any source, but was measured by what the plaintiff and appellant lost, less what the defendants had paid on account of the loss. Neither the defendants nor anyone acting for their benefit, paid anything whatsoever on account of the loss suffered by the plaintiff and appellant, and the measure of its recovery should be, therefore, the full value of the bonds and securities converted.

If the decision of the trial court upon this particular point is sound, and the right of plaintiff and appellant to recover is limited to the difference between what it has lost and what it has received as compensation from any source, then it permits the defendants and appellees to violate the maxim, "No man shall profit by his own wrong." Obviously, thtrough their own wrong, the defendants received the benefit of $27,300.00, the value of the property converted. By the decision they are required to pay only $6,752.98. In other words, they are allowed a clear profit on the reprehensible transaction to the extent of $20,547.02.

As we have already stated, there is no question that the absolute title and unqualified right of possession of the bonds and securities were in the plaintiff and its predecessor at the time of the commencement of the action. The bonds and securities had originally been deposited with Hart, as treasurer of the city, as security for a deposit of $25,000.00 of city funds placed in the bank. This deposit had been repaid in its entirety to the city. The plaintiff and appellant, as successor in interest of the Savings Bank, thereupon immediately became entitled to the possession of its bonds. The defendants were strangers to the title. They did not even possess a special or limited interest in the bonds and securities which would entitle them to any offset as against the full value recoverable by the plaintiff, or which would in any way limit recovery by the plaintiff.

The fact that the surety company on Hart's official bond and the plaintiff had entered into an agreement, whereby the surety company shared part of plaintiff's loss, and whereby it was agreed that the surety company should in turn share in the recovery by plaintiff in this action, could not be a matter of any concern to the defendants.

Where the defendant has no ownership in the property converted, the sort of title or interest enjoyed by the plaintiff is immaterial, and the full value of the property may be recovered.

Corey v. Struve, 170 Cal. 170;

California C. Fruit Assn. v. Ainesworth, 134 Cal. 461;

Thompson v. Toland, 48 Cal. 99.

In the *Corey v. Struve* case defendant had leased from plaintiff a tract of land for the purpose of growing beets. It was stipulated that the beet tops should not be removed from the land but should be allowed to remain thereon as fertilizer. The defendant sold the beet tops for cattle feed. In the suit, which was for the value of the beet tops, the defendant contended that the beet tops had been fed to cattle grazing on the premises and thereby fertilized the same better than would the beet tops. The court held that while this contention might be true, it did not constitute a credit or offset in favor of the defendant, and that the plaintiff was entitled to recover the full value of the beet tops. The court said:

> "The sort of ownership enjoyed by the plaintiff is a false quantity because the defendants were not and did not claim to be owners of any part of the beet-tops. So far as they were concerned the plaintiff had full title to the property, and the fact that he was bound by his contract to allow them to apply his property to the enrichment of land from which they were to get a portion of the crops, did not make them part owners of the beet-tops. The rule that the owners of a special interest in property may recover only to the extent of such interest applies only to cases where the suit is brought against the owner of the remaining interest or his assignee. (*California C. F. Assoc. v. Ainsworth,* 134 Cal. 463 (66 Pac. 586).) The tops had a value as fertilizer when plowed under and a value as cattle food. If the owner chose to enter into a contract whereby his tenants were to plow the tops under, surely the tenants' violation of that agreement could not clothe them with proprietorship of the feed. Suppose instead of beet-tops the property had been horses and plows which under the lease the tenants were bound to use only upon the landlord's acres, delivering the implements and animals to the owner at the end of the season in good condition, and suppose

> that after doing the plowing on their landlord's fields the tenants had rented the personal property to a neighbor on the theory that the exercise was good for the horses and the extra plowing efficacious for keeping the rust from the plows, would any one contend that the tenants might retain the fruits of the unauthorized exploitation of their landlord's property? So in the case before us, the unauthorized profit should belong to the person whose property earned it."

The true rule, of course, in cases of this kind is that where the plaintiff has only a special interest or limited property in the thing converted he may recover from the owner of the remaining interest, or from one claiming under such owner, only to the extent of his special or limited interest. This is true, for instance, in the case of an action by a pledgor against the pledgee for conversion. From any recovery had by a plaintiff in such an action against a defendant in such an action, the amount due the pledgee must be deducted from the value of the property converted. But in cases where the defendant has no interest or ownership whatsoever in the property converted, then the plaintiff, no matter what his own interest therein may be, is entitled to recover the full value.

If an action of trover be instituted by one who is entitled to bring the action, though he has but a limited interest in the property alleged to have been converted, he is entitled to recover the full value of the property as against a stranger.

Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770;
Jones v. Kellogg (Kan.), 33 Pac. 997;
Harker v. Dement, 9 Gill. (Md.) 7, 52 Am. Dec. 670;

Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137;

Booth v. Ableman, 20 Wis. 21, 88 Am. Dec. 730, 26 R. C. L. p. 1152.

In such a case any question as to a settlement between the plaintiff and a third person who also owns, or has acquired some interest in the property, is a question with which the court is not in any manner concerned. It was so held in the case of *Angier v. Taunton Paper Mfg. Co.* (Mass.), 61 Am. Dec. 436. Here the purchaser of a machine had agreed that the title should remain in the plaintiff until fully paid for, and such purchaser wrongfully mortgaged it to the defendant, who converted it to his own use after the purchaser had paid one-half of the purchase price. It was held that no deduction by reason of such payment should be made in the action against the defendant. In other words, it was held that the plaintiff could recover the full value of the machine, notwithstanding it had already received one-half the purchase price thereof from a third party.

The rule in such cases is fully set forth in 26 *Ruling Case Law,* under the title "Trover," section 68, at page 1152. The cases which we have already cited are discussed and, generally, it is said:

> "If an action of trover be instituted by one who is entitled to bring the action, though he has but a limited interest in the property alleged to have been converted, he is entitled to recover the full value of the property as against a stranger. The question as to any settlement between the plaintiff and the third person who also owns an interest in the property is not before the court. Thus, where the purchaser of a machine had agreed that the title should remain in the

plaintiff until fully paid for, and such purchaser wrongfully mortgaged it to the defendant who converted it to his own use after the purchaser had paid one-half of the purchase price, it was held that no deduction by reason of such payment should be made in the action against the defendant. However, if the property is converted by the owner of an interest therein or by one acting in privity with him, the plaintiff can recover only to the extent of the value of his own interest in the property. Thus, in an action of trover by a general owner against a lienholder, or one who claims under such lienholder, the amount of the lien of the latter must be deducted from the value of the property. So also it has been held that a constable can recover only the amount of his execution in an action of trover against an assignee of the debtor who has taken the goods after the levy."

We trust that we have cited enough authorities on this particular point to show that, under the admitted facts in this case, the trial court was in error when it held that because the plaintiff and appellant had been reimbursed for a portion of its loss by the surety company it was precluded from recovery of its full loss from the defendants.

II.

The Payment of Part of the Loss by the Surety Company and Its Release From Liability by the Plaintiff Did Not Operate as a Release of Hart, or the National Bank as Joint Tort Feasors.

In view of the plainly worded decision of the trial court it is hardly necessary to discuss this proposition. The court correctly held that while the estate of Hart stands in the position of a joint tort feasor with the National Bank, neither the surety company nor the city were joint tort feasors with Hart or the National Bank. It further

held that neither the estate of Hart nor the National Bank had ever been released. There is no appeal from the decision of the court on these points and they stand before this court as adjudicated facts, binding upon both of the parties.

It is true that the surety company, by reason of its bond, was jointly liable with Hart to the city to the extent of its undertaking. But its liability was essentially different from that of Hart. The liability of the latter for the conversion was primary and was for damages arising from a tort. The liability of the surety company, on the other hand, was secondary to that of Hart and was based upon its contract of suretyship. Obviously, therefore, it was not a joint tort feasor with Hart.

Nor did the settlement between the plaintiff and appellant and the surety company, and the release of the surety company from further liability, in any way affect the liability of Hart, or of Hart's estate, or of the National Bank. A creditor may, if he so elects, release or compound with a surety without in any way affecting his right to hold the principal for his full liability.

Nashua Sav. Bank v. Abbott (Mass.), 63 N. E. 1058;

Farmers etc. Bank v. Rathbone (Vt.), 58 Am. Dec. 200.

In this connection it will be noted that at the time of the settlement between the plaintiff and appellant and the surety company various actions at law were pending in which the surety company was an interested party: (1) The Savings Bank had commenced a suit against Hart

and the surety on his official bond as city treasurer to recover the value of the bonds and securities converted by Hart; (2) the Savings Bank had commenced a suit against the city of Merced to recover the value of the securities converted by Hart; (3) the city of Merced had commenced a suit against the Savings Bank to recover the balance of the special deposit of city moneys that remained on deposit in the plaintiff bank as successor of the Savings Bank; and (4) the city of Merced had sued Hart and the surety company to recover city moneys of approximately $30,000.00 misappropriated by Hart. As a result of the settlement between the plaintiff and appellant and the surety company all these suits were dismissed. The surety company disclaimed liability to the Savings Bank or to plaintiff and appellant, as its successor, because of the conversion by Hart of the bonds and securities. It was, however, clearly liable to the city for the balance of the deposit in the Savings Bank which the plaintiff and appellant retained and refused to pay over. The ultimate settlement, therefore, between the plaintiff and appellant and the surety company covered a multitude of transactions. In its payments to the plaintiff and appellant, what it really did was to purchase immunity from further liability on account of any of the suits then pending, including the suit where the city, as plaintiff, sued it and Hart for the balance of the deposit in the Savings Bank.

Such settlement and release of the surety company by the plaintiff and appellant, therefore, had no effect whatsoever in discharging Hart from liability because of his conversion of the bonds and securities belonging to the plaintiff and appellant. Neither Hart nor the National

Bank is entitled to credit for any sum paid by the surety company in consideration of its release.

Gilstrap v. Smith, 28 S. E. 608, 21 R. C. L. p. 1050.

While unquestionably the law is that if the creditor, without the knowledge and consent of the surety, should release the principal debtor, the surety would be thereby released, the release of a surety does not increase the legal or equitable responsibilities of the principal, nor as to him change the nature or extent of his obligation.

In 21 *Ruling Case Law,* page 1049, section 94, it is said:

> "Not only may a creditor, if he so chooses, release or compound with a surety, but he may do so without in any way affecting his right to hold the principal to his ultimate liability. In other words, not only will such a release have no effect in discharging the principal, but the latter will not be entitled to credit on his obligation for any sum paid by the surety in consideration of his release as such surety. While unquestionably the law is that if the creditor, without the knowledge and consent of the surety, should release the principal debtor, the surety would be thereby released, the release of a surety does not increase the legal or equitable responsibilities of the principal, nor as to him change the nature or extent of his contract. Nor does the merger of the contract in a judgment exclude the operation of this rule. So where the creditor has levied on property of the sureties, he may, with the consent of the sureties only, although the principal is joined with the sureties as defendants, abandon the levy and sue out a new execution against all the defendants, no injury being done to the principal by releasing the lien on the property of the sureties, since that lien cannot inure to his benefit in any possible event. Since a creditor may relinquish his claim against a surety *a fortiori* he may make a valid

agreement with him for further time without prejudice to the rights of the principal or his creditors."

In 32 *Cyc.* at page 156 it is stated that the release of a surety does not affect the liability of the principal. In support of this proposition numerous cases are cited, and among them the following:

Union Nat. Bank v. Legendre, 35 La. Ann. 787;
Mortland v. Himes, 8 Pa. St. 265;
Wolf v. Fink, 1 Pa. St. 435, 44 Am. Dec. 141;
Baldwin v. Ralston, 6 Pa. Dist. 198;
Ragsdale v. Gossett, 2 Lea (Tenn.) 729;
McIlhenny Co. v. Blum, 68 Tex. 197, 4 S. W. 367;
Bridges v. Phillips, 17 Tex. 128.

It is important to keep in mind the theory under which the various payments were made by the surety company and the true nature of the settlement between it and the plaintiff and appellant. In order to secure a compromise and settlement of all the suits in which it was interested as a party defendant, it first paid to the plaintiff and appellant the sum of $14,000.00, with interest. This represented the balance of the city deposit originally made with the Savings Bank. The plaintiff and appellant, upon receipt of this $14,000.00 and interest, released the balance of the deposit to the city. This payment was, therefore, in effect a payment by the surety company to the city of the balance of its deposit with the Savings Bank. Prior to this the Savings Bank and the plaintiff and appellant had refused to turn this balance over to the city because of the conversion of its bonds and securities by Hart, the city treasurer. The surety company was clearly liable to the city for this sum of money, although it disclaimed any

liability to the Savings Bank or to the plaintiff and appellant by reason of the conversion by Hart of the bonds and securities. The surety company next paid to plaintiff and appellant the sum of $5,500.00. This was paid as part of its settlement with the plaintiff and appellant whereby it secured a release and immunity from further liability on account of any of the litigation which had then been commenced. Neither of these payments was made by the surety company or received by the plaintiff and appellant with the intent to discharge or diminish the liability of Hart.

When these payments were made there was forthwith vested in the surety company a cause of action against Hart, under the provisions of section 2847 of the California Civil Code, which reads as follows:

> "If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses."

By reason, therefore, of the settlement and the payments made by the surety company, the latter became interested in any judgment the plaintiff and appellant might obtain against the appellee National Bank as the joint tort feasor of Hart. Accordingly, it was made a part of the agreement of settlement that the plaintiff and appellant should commence this action and that any sums recovered should be shared by the plaintiff and appellant and the surety company in the proportions set forth in the agreement. In the action which was later commenced the plaintiff and appellant might have made the estate of Hart a party defendant with the National Bank. The estate, however,

was in the process of probate and the plaintiff and appellant had, in the probate proceedings, duly presented its claim for the full amount involved in this action. The joining of the Hart estate as a party defendant, therefore, would have been attended with some difficulty and would have been entirely unnecessary. The appellee National Bank cannot be heard to complain because of the non-joinder of the Hart estate as a party defendant. Neither can it be heard to say that such failure constitutes an admission that the estate of Hart has been settled with and released from liability, either in whole or in part. The liability of the estate remains the same as it was before the settlement and before the commencement of this action.

Under the facts in this case and the decision of the trial court, and the authorities referred to, it is inconceivable to us that the appellee National Bank can contend on this appeal that the payments made by the surety company to the plaintiff and appellant, and its consequent discharge from further liability, operated as a discharge of Hart, or Hart's estate, or the National Bank, appellee in this case.

III.

The Bank of Italy Is the Proper and Only Necessary Party Plaintiff to the Present Action.

We have already sufficiently discussed the uncontroverted fact that, at the time of the conversion of the bonds and securities by Hart and the appellee National Bank, the plaintiff and its predecessor in interest were the legal owners of such bonds and securities and that at the time of the commencement of this action the plaintiff was entitled to the possession thereof. It is fundamental that the owner of the legal title to the property converted is the

proper party plaintiff in an action founded upon the conversion. This is especially true where such owner is also vested with the right of possession of the property at the time of the conversion.

Rosenthal v. McMann, 93 Cal. 505;
Mier v. So. Cal. Ice Co., 56 Cal. App. 512;
Moody v. Goodwin, 53 Cal. App. 693.

As has been stated, there can be no doubt that the plaintiff was the legal owner and entitled to the possession of the bonds and securities at the time of the commencement of this action. It does not matter that it had been reimbursed by a third party, the surety company, for a portion of the loss which it had sustained through the conversion of the bonds and securities. If these reimbursements had been made by the appellee National Bank, or by its joint tort feasor, Hart, or Hart's estate, they, or any of them, would have been entitled to proportionate set-offs or credits against the value of the property converted. None of these reimbursements having been made, however, by any of the joint tort feasors, none of the latter, including the National Bank, is entitled to any credit or set-off and the plaintiff is entitled to full recovery for the wrongful act.

The mere fact that the surety company entered into an arrangement with the plaintiff whereby it paid plaintiff part of the latter's loss, and in consideration of such payment became entitled to share in the ultimate recovery by plaintiff against the wrongdoers, is a matter of no concern to such wrongdoers. So far as they and their rights are concerned, the collateral agreement between the plaintiff and appellant and the surety company is entirely immaterial. Their liability was measured by the loss occasioned

through their wrongful act. The only way in which they could extinguish or diminish such liability was through payment, in whole or in part, of the obligation incurred. Payment to the plaintiff by them, or by one acting for their benefit, would have accomplished the desired result. The mere fact that a third person paid to plaintiff a part of the loss and became interested and entitled to share in the ultimate recovery against the wrongdoers would not in the least affect the liability of the latter, or the obligation imposed upon them by law.

It has already been noted that the settlement and arrangement between the plaintiff and appellant and the surety, Fidelity and Deposit Company of Maryland, was finally set forth in a confirmatory letter written by the surety company and addressed to and acted upon by the plaintiff and appellant. This letter is shown at page 97 of the record. The portion thereof which concerns us at this point of the discussion is worded as follows:

> "We understand you will at once bring suit against the receiver of the Farmers & Merchants Bank for the value of the bonds misappropriated by that bank, and that in consideration of the payments made to you, you will, if successful, pay to us one-half of the net proceeds of that suit, after deducting all costs, expenses and attorney's fees. In case either you or we are reimbursed in full for any loss, then the other party shall be entitled to the balance of the net proceeds until it is fully reimbursed."

By reason of the arrangement evidenced by this letter it is obvious that the plaintiff and appellant bank was thereby made the trustee and agent of the Fidelity and Deposit Company of Maryland. In bringing this action, pursuant to the directions contained in the letter, it was

acting not only in its own right for the recovery of that portion of its loss for which it had not received reimbursement, but also as the express trustee of the Fidelity and Deposit Company of Maryland for the recovery of that portion of its loss for which it had received compensation or reimbursement from the surety company. As against the defendants, however, there was but a single cause of action which was based upon the single wrongful act of conversion of the bonds and securities.

Fairbanks v. S. F. & N. P. Ry. Co., 115 Cal. 583.

The Bank of Italy, the plaintiff and appellant, and the Fidelity and Deposit Company of Maryland could not have joined as plaintiffs in the action because the amounts to which each would be entitled would be different and there could be no joint judgment.

Atchison, Topeka & S. F. Ry. Co. v. Neet, 54 Pac. 134.

It was entirely proper that the plaintiff and appellant should become the sole plaintiff in the action and bring the suit in its own name without reference to its beneficiary, the Fidelity and Deposit Company of Maryland. Section 369 of the *California Code of Civil Procedure,* in part, reads as follows:

> "An executor or administrator, or trustee, of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted."

Where the legal title to property is vested in a trustee, it is unnecessary to state in his complaint the means by which he acquired it.

Dambmann v. White, 48 Cal. 439;
Giselman v. Starr, 106 Cal. 651;
Bliss on Code Pleading, Sec. 262;
Pomeroy on Code Remedies, Sec. 132;
Munch v. Williamson, 24 Cal. 167;
Lewis v. Adams, 70 Cal. 403.

In the case of *Cortelyou v. Jones,* 132 Cal. 132, the rule in California on this point is clearly stated. The court says:

> "The appellants urge in support of their appeal that, as under the assignment the plaintiffs are made the trustees of an express trust, they could bring the action only in their representative capacity, and should have set up in their complaint the facts creating the trust, and were not entitled to a judgment in favor of themselves individually. Their contention in this respect cannot, however, be sustained. By the terms of the assignment the mortgages and debts were transferred to the plaintiffs, 'to be collected, and the proceeds to be held in trust.' The legal title thereto was therefore vested in the plaintiffs, and the beneficiaries under the trust had no interest, except in the proceeds of the collection. A payment by the defendants to the plaintiffs without suit would have exonerated them from all liability to the beneficiaries, and they will be equally exonerated by a satisfaction of the judgment herein."

In the case of *McElmurray v. Harris,* 43 S. E. 987, it was held that where the party in whom the title was at the time of the conversion sues in trover for the use of another, the name of the usee may be treated as surplusage.

In the case of *Chamberlain v. Woolsey,* 95 N. W. 38, it was held that one having the legal title and right of pos-

session of personal property at the time of the conversion may sue for such wrongful conversion without joining a party who may have a beneficial interest therein.

The rule that every action must be prosecuted in the name of the real party in interest has been fully complied with in this case. The object of this rule is to save the defendant from further harassment or vexation at the hands of other claimants to the same demand. The primary and fundamental test to be applied, therefore, in any case is whether the suit will accomplish this result.

Los Robles Water Co. v. Stoneman, 146 Cal. 203;
Woodsum v. Cole, 69 Cal. 142.

The plaintiff in this case has shown that it possesses such title and right of possession to the property converted that a judgment upon it, satisfied by the defendants, will protect them from future loss. In any future action based upon their wrongful act in converting the bonds and securities, they will be able to plead the judgment in this case as a defense. The defendants are not further concerned with who may or may not be the plaintiff in this action. As to them, the action is being prosecuted in the name of the real party in interest.

Los Robles Water Company v. Stoneman, supra;
Iowa & California Land Co. v. Hoag, 132 Cal. 627;
Kelley-Clarke Co. v. Leslie, 61 Cal. App. 559.

So far as the defendants in this case are concerned it is not for them to question the extent of the interest of plaintiff in the subject matter of the litigation. Anyone having such interest in the property converted as will enable him

to maintain an action for the tort is the real party in interest and may sue in his own name.

Hansen v. Townsend, 73 Cal. 415;
Walker v. McCusker, 71 Cal. 594;
Lauer v. Williams, 32 Cal. App. 590.

Still another good and sufficient reason why the defendants in this case cannot complain that the action was not brought in the name of the real party in interest lies in the fact that they did not, either by demurrer or answer, question the right of the plaintiff to sue. They had full knowledge of the true facts and of the payments made by the surety company. This is evidenced by the fact that these matters are set forth in their answer. Under the circumstances, therefore, they must be deemed to have waived any objection to the bringing of the action in the name of the plaintiff alone, or any objection to the non-joinder of the surety company, or to the failure to set up the rights of the surety company as a beneficiary.

Kline v. Guaranty Oil Co., 167 Cal. 476;
Graham v. Light, 4 Cal. App. 400;
Coch v. Story, 107 Pac. 1093.

In the case of *Kline v. Guaranty Oil Co., supra,* the Supreme Court held:

> "In this action by a lessee of oil property to recover his damages for a breach of the lease, consisting of the expense incurred in the examination of title, the drawing of papers necessary to the performance of the contract, and the preparation to enter upon the premises, the lessee is held to be the proper party plaintiff, although he had assigned the lease, but the defendant, with knowledge of the assignment, failed to raise the question, by demurrer or otherwise, of

> the right of the lessee to sue, and allowed the case to be tried on the theory that the plaintiff was entitled to sue if anyone was."

We have, in the preparation of this opening brief, dwelt upon many points, somewhat in anticipation of points which will be urged by the appellees. This is based upon certain contentions made by the appellees in the trial court and to some extent shown by the pleadings. In their answer, for instance, at page 17 of the record, the defendants allege:

> "* * * that prior to the commencement of the above entitled action the said Merced Security Savings Bank and the plaintiff herein settled and adjusted any and all claims arising out of the transaction concerning said bonds mentioned in the complaint herein with the sureties of the said J. B. Hart as city treasurer of the city of Merced, and defendants are informed and believe, and upon such information and belief allege the fact to be, that a surety company, the name of which is unknown to the defendants herein, fully paid and discharged all of the obligations of the said J. B. Hart as city treasurer of the city of Merced and of said surety company as his surety as such public officer to the said Merced Security Savings Bank and to the plaintiff herein, and that the said Merced Security and Savings Bank and the said plaintiff herein then, at the time of said settlement and prior to the commencement of this action, received from the said surety company, whose name is unknown to these defendants, full pay and compensation for any and all losses sustained by them, or by either of them, by reason of any and all transactions of the said J. B. Hart as treasurer of the said city of Merced, or in any manner whatsoever in connection with any and all of the bonds mentioned in the complaint herein and received by the said J. B. Hart as treasurer of the city of Merced as security for deposits made of moneys belonging to the said city of Merced in the said Merced Security Savings Bank."

Under these allegations the defendants at the trial sought to show that prior to the commencement of this action the plaintiff and appellant, by the settlement and agreement with the surety company, settled with Hart on account of his conversion of the bonds and securities, and thereby fully released Hart and extinguished the obligation on his part to pay the loss occasioned by his wrongdoing. We think we have sufficiently shown, however, that the agreement between the plaintiff and appellant and the surety company did not have the effect of releasing Hart, or the estate of Hart, or of extinguishing the obligation incurred by Hart in the wrongful conversion of the bonds and securities. Inasmuch as Hart and his estate were not so released, his joint tort feasor, the appellee National Bank, was likewise not released.

As we have already said, moreover, we believe that this question was fully settled and adjudicated by the decision of the trial court from which the defendants and appellees have not appealed. The court expressly found that neither Hart nor his estate was released from liability by the agreement with plaintiff and appellant releasing the surety company. We submit that the defendants and appellees are bound by such finding of the trial court on this appeal.

In conclusion we submit that from all that has been said it must appear to this court:

1. That the plaintiff and appellant was the real party in interest, and that the action was properly brought in its name alone.

2. That the payments made to plaintiff and appellant by the surety company which preceded this litigation cannot be credited to the defendants for the reason that these

payments were part of a collateral agreement in which the defendants were not in any manner concerned.

3. That although these payments were made by the surety company on Hart's official bond, they did not operate as a release, either in whole or in part, of the obligations imposed upon Hart by operation of law resulting from his wrongful conversion of the bonds and securities.

4. That inasmuch as neither Hart nor his estate was released from liability, his joint tort feasor, the appellee National Bank, was not released.

5. That plaintiff and appellant was entitled to recover the full value of the bonds and securities converted, amounting to $27,300.00, and was not restricted, as found by the court, to recovery in the sum of $6,752.98 only.

We submit that in view of what has been said, and in view of the authorities cited, the judgment appealed from should be modified in accordance with the views which we have expressed.

Respectfully submitted,

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Attorneys for Plaintiff and Appellant.

APPENDIX.

Memorandum of Decision on Merits.

This is an action for conversion of personal property by plaintiff as assignee of Merced Security Savings Bank (herein called Savings Bank) against Farmers and Merchants National Bank of Merced (herein called National Bank), and Henry P. Hilliard as receiver thereof. The suit was originally filed in the State Court of California, but was removed here by the National Bank's receiver.

The Savings Bank in order to obtain a deposit of $25,000.00 of the funds of the city of Merced, a municipal corporation of California, from one J. B. Hart, the city treasurer, deposited with Hart, as city treasurer, certain of its negotiable municipal bonds of the value of approximately $28,000.00. These securities were required by the laws of California to be deposited in order that the Savings Bank could receive the deposit of the city's funds. (California Statutes, 1923, pages 25-28.) Upon delivery of the bonds to him, Hart, as treasurer, deposited $25,000.00 of the city's money in the Savings Bank. At the time of the deposit of the bonds of the Savings Bank, Hart was also president and active manager of the National Bank and transacted the business of the two offices in the same premises, using the premises and facilities of the National Bank as a depositary of city monies and securities. The complaint alleges that between Dec. 31, 1925, the date of the deposit and placing of the securities of the Savings Bank with Hart, as city treasurer, and September 20, 1926, Hart delivered the possession of said bonds to the National Bank, and that on May 13, 1926, the Na-

tional Bank sold and converted said bonds of the Savings Bank or of the city of Merced and appropriated the proceeds thereof to its own use to the damage of the Savings Bank in the sum of $28,000.00. Judgment is asked against defendants for that amount of money and interest from date of conversion. It is alleged that the sale and conversion of said bonds was not made in connection with said deposit of public funds and was not dependent upon or connected therewith in any way whatever. This latter allegation is uncontroverted and stands in the record as admitted. The complaint further avers that the conversion was unknown to the Savings Bank or to its successor, plaintiff herein, and was not discovered until subsequent to November 20, 1926, at which time the National Bank went into liquidation and the defendant receiver was named by the comptroller. The customary allegations of demand and refusal to deliver together with the usual averment of presentation of claim to the receiver and rejection thereof by him appear in the complaint as do also the ordinary allegations of assignment of the claim sued on to plaintiff herein. The misappropriation of the bonds placed with Hart to obtain the deposit of city money in the Savings Bank was an incident in a series of defalcations of Hart as city treasurer of Merced that culminated in his suicide shortly after discovery of his iregularities.

The answer of defendants denies the allegations of conversion by the National Bank and generally denies all of the other essential allegations of the complaint including a denial that defendant National Bank at any time received, acquired title to, or converted any of said deposited bonds of the Savings Bank. It is claimed that Hart as

agent of the National Bank never received or converted the bonds, but that his wrongdoing was personal or as city treasurer and not imputable to the National Bank. The answer sets up a further defense that there has been a compromise, settlement, and discharge of the claim of plaintiff and its assignor by reason of the alleged conversion of the bonds of the Savings Bank and that the claim of plaintiff and its assignor has been fully satisfied and paid by reason of certain transactions between the surety on the official bond of Hart as city treasurer, the city of Merced, a municipal corporation, and the plaintiff.

It is unnecessary to review in detail the evidence. It is complicated and involved. It is sufficient to state that it establishes the right of the plaintiff to recover under the issues raised by the complaint and answer.

The correspondence of Hart as the National Bank president as well as the books and records of the National Bank and specifically the entries therein concerning the bonds alleged to have been converted, clearly show that Hart was the agent of defendant National Bank in dealing with the securities in suit and that the conversion of the bonds of the Savings Bank admittedly made by Hart is chargeable to the National Bank as his principal. These records represent that the National Bank was the owner of the securities. The city could not be held chargeable for Hart's keeping, management and disposal of the bonds under the applicable California statutes (Sec. 8, Cal. Stat. 1923, p. 25.) It is contended that the National Bank should not be held accountable for the conversion and loss of the securities of the Savings Bank

because the evidence fails to show that the National Bank profited by the irregularities and dishonesty of Hart in converting these securities. I cannot agree with this contention. The record is clear that the assets of the National Bank were preserved and enhanced by its president's transactions concerning these bonds with the First National Bank in Fresno. The transactions were apparently regular and within the apparent lawful and customary duties of an officer of a National Bank and inured to the benefit of the National Bank. See Campbell v. Mfg. Nat. Bank, 91 Am. State Rep.. 438; First Nat. Bank v. Town of Millford, 36 Conn. 93; Bennett v. Judson, 21 N. Y. 238; U. S. v. Pan Am. Pet. Co., 24 Fed. 2nd 209. It is also clear that the Savings Bank sustained detriment and money damage because of the conversion. It has lost its bonds. Its damage is the market value of them. Under such circumstances the responsibility of the National Bank and the right of recovery in the Savings Bank is clear.

The defendant has cited many cases, of which School Dist. of City of Sedalia, Mo., v. De Weese, 100 Fed. 705, is typical. I do not regard these authorities as in point here. In all of them it appeared and was so held that the agent of the bank was acting in his individual capacity or at least was not acting within the apparent scope of his authority as the bank's agent. In the case at bar, however, I have already adverted to the clarity of the evidence that showed the transactions of Hart with the bonds in question to have been those of the National Bank. These facts clearly distinguish the case cited by defendant.

This brings us to a consideration of the final contention of defendants that there has been a compromise and settlement of all claims involving the irregularities and defalcations of Hart as city treasurer and any claim of this plaintiff arising out of the bond transactions that are the subject matter of this action. In support of such contention, it was shown that after discovery of the loss of the securities involved in this suit and of the defalcations of Hart as city treasurer, four actions were commenced, viz.: (1) The Savings Bank commenced a suit against Hart and the surety on his official bond as city treasurer to recover the value of these securities converted by Hart. (2) The Savings Bank commenced a suit against the city of Merced to recover the value of the securities converted by Hart. (3) The city of Merced commenced a suit against the Savings Bank to recover the balance of the special deposit of city monies that remained on deposit in plaintiff bank as successor of the Savings Bank, and, (4) the City of Merced sued Hart and the corporate surety on his official bond to recover city monies of approximately $30,000.00 that Hart misappropriated as city treasurer, and which included the balance of the special deposit of city money with the Savings Bank amounting to $14,000.00 which plaintiff bank, as successor of the Savings Bank, refused to pay over to the city because of the conversion of the bonds by Hart. It further appeared that by negotiations, all of these four suits were dismissed and a settlement reached between litigants. In the settlement, the city received the balance of the special deposit amounting to $14,000.00 from the plaintiff herein, as successor of the Savings Bank

wherein the original deposit of $25,000.00 was made by Treasurer Hart of the city's monies. In addition, the city of Merced received from the surety company $11,000.00 in reimbursement for the defalcations of Hart of the city's money and in addition obtained an agreement from the surety company that it would hold the city harmless from any claim of the defendant receiver because of said outstanding city warrants amounting to approximately $3,000.00. In disposing of the suit by the Savings Bank against Hart and the corporate surety on his official bond, it appeared that the surety company asserted the position that it was not liable to the Savings Bank, but an agreement was entered into between the surety company and the plaintiff bank, as successor of the Savings Bank, which is evidenced by letters that were received in evidence. From these it appears that the surety company paid the various amounts hereinbefore stated and paid to plaintiff, as successor of the Savings Bank, the further sum of $5,500.00, and as part of said adjustment and settlement it was further agreed that plaintiff, as successor of the Savings Bank, would commence this action for the value of the bonds converted by the bank, and if it is successful in recovering against the National Bank and its receiver, it would pay one-half of the net proceeds of the suit to the bonding company. There were other provisions in the settlement, which are immaterial in the consideration of the asserted defense of compromise and settlement. The record fails to substantiate the contention of defendants that plaintiff, as the Savings Bank's successor, has accepted full satisfaction from the administrator of Hart's estate and has released his estate from any further liability on account

of the conversion by Hart of the bonds in controversy. On the contrary, it appears that the plaintiff has presented its claim against the estate of Hart for the value of its securities that Hart misappropriated and it further appears that no settlement or payment of any kind has been made or received on said claim. All that was done by plaintiff or its assignor was to dismiss the suit against the administrator of Hart's estate. The record shows no acknowledgment of satisfaction of the claim against Hart or his estate. It is true that where a suitor settles with one of two joint tort feasors and releases such one from further liability, his action is in effect a release of both joint tort feasors, but in my opinion, the proof in this complaint falls short of bringing the facts of this case within the aforesaid rule. The action of the successor of the Savings Bank in dismissing the case against Hart and the corporate surety on his official bond as city treasurer to recover the value of the securities converted amounted to nothing more than a covenant not to sue the Hart estate or the surety company and cannot be said to have been the discharge of a joint tort feasor that would operate to release a national bank from its liability because of its conversion through the agency of Hart of the bonds of the Savings Bank. The letters consummating the settlement agreed upon by the surety company, city of Merced and plaintiff contain a reservation by plaintiff as the Saving Bank's successor of its right to pursue the National Bank on Hart's default, and no acquittance is therein given to Hart's estate. The estate of Hart stands in the position of the joint tort feasor with the National Bank and it has never been re-

leased. Neither the surety company nor the city were joint tort feasors with Hart or the National Bank. See Gilbert v. Finch, 173 N. Y. 455.

However, it does appear that plaintiff has received $5500.00 in the aforesaid settlement which must be applied in law to the demand sued on in this action. There can be but one compensation for an injury or tort of the kind that is involved in this suit, which is the market value of the securities converted at the time of conversion, with interest thereon until judgment. The plaintiff has received partial compensation of its loss. It is immaterial from whom any portion of such damage is paid, but any payment on account thereof reduces the liability *pro tanto*. Under the aforesaid rule and the evidence in this case, the defendants are undoubtedly entitled to a credit of $5,500.00 on the claim here sued on.

It follows from the foregoing that plaintiff is entitled to findings and judgment under all issues of the complaint and answer herein for the sum of $22,500.00, with interest thereon at the rate of 7% per annum from May 14, 1926, and for its costs of suit herein, all as prayed for in the complaint on file in this cause.

The motion of defendant for special or any findings or judgment contrary to the views expressed in the aforesaid memorandum opinion are and each of them is denied. Counsel for plaintiff will prepare, serve and present under the rules of this court findings and judgment in accordance with the views hereinbefore expressed.

Dated May 1, 1929.

PAUL J. MCCORMICK,
United States District Judge.

Addenda to Memorandum of Decision on Merits.

In the minute order for judgment in favor of plaintiff herein, as well as in the memorandum of decision on merits filed herein, the court has allowed a reduction and diminution of the liability of defendants under the issues of this case for the sum of $5,500.00, while the briefs of both counsel in this case refer to a payment of $20,000.00 to the plaintiff herein by the corporate surety on the official bond of City Treasurer Hart, I have been unable to find any evidence in the transcript of testimony and proceedings on trial of this case showing that the plaintiff herein actually received from the surety company the balance of the city's deposit of $25,000.00 that remained in the Savings Bank at the time of the dismissal of the various suits concerning these transactions. The record is clear as shown by the testimony of Mr. F. W. Henderson, page 112, *et seq.,* of the transcript, and as disclosed by Defendants' Exhibits E and G, that it was part of the settlement that the plaintiff bank upon paying the balance of the city's special deposit to the city would be reimbursed by the surety company. I have not been able to find any further evidence showing that such reimbursement was actually made. Of course, if it is a fact that reimbursement was made and plaintiff actually received any sum of money in addition to the $5,500.00 in the settlement, then under the memorandum decision, defendants would be entitled to credit for such additional amounts received by plaintiff herein, and the order for findings and judgment in favor of plaintiff and against defendants should be correspondingly modified.

If counsel for the respective parties cannot agree and file written stipulation herein concerning the reimbursement to plaintiff, and the actual receipt by it of the balance of said special deposit and the fact of such payment can be established, then the defendant will be entitled to pursue such procedure in this case as will show any amount of money in addition to said $5,500.00 that plaintiff has received in the transaction concerning the dismissal of the four suits involved in this controversy.

Dated May 2, 1929.

PAUL J. MCCORMICK,
United States District Judge.